IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 3RD AUGUST 2007 / 12TH SRAVANA 1929

CRL.A.No. 2242 of 2005()

SC.1511/2002 of III ADDL.SESSIONS COURT, KOLLAM

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APPELLANT/ACCCUSED:

SIVASANKARA PILLAI, S/O.CHELLAPPAN
PILLAI, VAYALIL PUTHEN VEEDU, KOLIKOLLOOR VILLAGE,
KOLLAM TALUK.

BY ADV. SRI.C.RAJENDRAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REP. BY THE CIRCLE
INSPECTOR OF EXCISE, KOLLAM EXCISE RANGE
(CRIME NO.1108/1997) THROUGH PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL.M.A. NO.23154 OF 2005 IN CRL. APPEAL NO. 2242 OF 2005.

DISMISSED

3.8.2007 Sd/(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO.2242 OF 2005

Dated this the 3rd day of August, 2007

JUDGMENT

The sole accused in S.C. No.1511 of 2002 on the file of the III Additional Sessions Court, Kollam is the appellant. The appellant faced trial for the offence punishable under Section 55(a) of the Abkari Act.

2. The prosecution case against the appellant - accused was that on 17.12.1997 at 5.15 p.m., six cannas, each containing two litres of arrack were found in the lien-to shed attached to the house where the appellant was present. It was the further case of the prosecution that seven empty cans emitting smell of arrack were also found in the same room. To prove the case against the appellant, the prosecution examined PWs.1 to 4 and produced Exts.P1 to P7 as well as MOs. 1 and 2 series. No oral or documentary evidence was adduced on the side of the defence. After closing the prosecution evidence, the accused was questioned under Section 313 Cr.P.C.. He denied the allegations levelled against him and stated that the case was foisted against him at the instance of his

neighbour, one Sasidharan Unnithan on account of the civil and criminal cases were pending between him and the said Sasidharan Unnithan. He further stated that the house from where the contraband articles were seized does not belong to him. However, after considering the prosecution evidence, the trial court found the appellant guilty under Section 55(a) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of three months. The benefit under Section 428 Cr.P.C. was also granted to the petitioner. The above conviction and sentence are challenged in this appeal.

3. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant has raised the following contentions: (i) the finding of the trial court that the appellant committed offence punishable under Section 55(a) of the Abkari Act is not legally sustainable as the prosecution failed to prove that the contraband articles found in the possession of the appellant were in connection with export, import, transport or transit, (ii) the trial court committed serious

error in placing reliance on the evidence of PWs.2 and 3 as there was no independent evidence to support their version and (iii) PW.3, the Excise Range Inspector had violated the mandatory provisions of Section 31 of the Abkari Act and the provisions of the Kerala Excise Manual while conducting search of the house and seizure of the contraband articles as there was no evidence to show that he had prepared and sent a search memo to the court before entering the house and no independent witness was present at the time of search and seizure and while taking the samples for chemical analysis and producing the same before the court below so as to rule out the chance of substitution.

5. The trial court relied on the evidence of PWs.2 and 3 to prove that the appellant was found in possession of 12 litres of arrack on 17.12.1997. PW.2, the Circle Inspector, Excise, Kollam was the officer who detected the offence. He stated before the court below that on 17.12.1997 at 5.15 p.m. on getting information that the appellant was engaged in the sale of arrack, he along with other officials went to the house of the appellant and on conducting a search, found six cannas each containing 2 litres of arrack and seven empty cans emitting smell of arrack. He further stated that he took 200 ml. of arrack from one of the cans as sample, sealed and labelled the cans containing the contraband articles as

well as the bottle containing the sample and seized the contraband articles as per Ext.P2 mahazar. This witness further stated that he prepared Ext.P3 arrest memo, arrested the accused and produced the accused as well as the contraband articles before the Circle Office.

6. PW.3 was the Excise Inspector attached to the circle office who had accompanied PW.2 during the relevant time. He gave evidence in support of the version given by PW.2. He stated that he prepared Ext.P5 occurrence report on 18.12.1997 and produced the accused before the court along with the material objects. PW.4, the Excise Inspector, Kollam range stated that he conducted further investigation in the matter and filed the charge sheet. He also stated that he proved Ext.P7 chemical analysis report. Though PW.1, an independent witness, was examined to prove search and seizure, this witness turned hostile to the prosecution.

7. Though the case set up by the appellant - accused was that he was not arrested from his house, the trial court considering Exts.P1, P2 and other documents found that the appellant was residing in the house from where the contraband articles were seized. The question to be considered in this appeal is whether the evidence of PWs.2 and 3 would show that the house from where the contraband articles were seized belongs to the

appellant.

8. The evidence of PW.3 would show that there were more than one excise officials with him during the relevant time, but only PW.2 has signed Ext.P2 mahazar. That apart, PW.3 had admitted that some of the people of the locality were present at the time of detection of the offence, but none of them were examined and except PW.1, the other witnesses were given up by the prosecution. PW.1 had turned hostile to the prosecution. In this context, the case set up by the appellant assumes relevance. He had stated that the house from where the contraband articles were seized did not belong to him and that he was residing at Thundil house. It is also to be noted that PWs.2 and 3 had admitted that they had not verified any Panchayat record or any other documents to show that the house from where the contraband articles were seized belonged to the appellant. Further, though PW.3 admitted that he had prepared the search memo and forwarded a copy of the same to the court, there was no record before the court below showing receipt of such a search memo. Though the trial court considered this point, the trial court accepted the evidence of PWs.2 and 3. in the light of Exts.P1, P2 and P3. As per Section 31 of the Abkari Act,. before conducting search of a residential house, it is obligatory on the part of the excise officials or any

police officer to prepare a search memo in the absence of a search warrant. This mandate contemplated in the above section is for procedural conformity of the action of the excise or police officials. Apart from the above, though PWs.2 and 3 had stated that sample was taken from the contraband articles at the spot, there is no indication in Ext.P2 mahazar regarding taking of the sample. It has also come out in evidence that no seals or labels were seen on MO.1 plastic cans containing the contraband articles and MO.2 empty plastic cans when those were produced before the court below. These circumstances create reasonable doubt regarding the alleged search and seizure made by PW.3.

9. There is also no evidence to show that the contraband articles were produced before the court below in time as no thondi list was produced. This was justified by the trial court by stating that the thondi list might have been misplaced in the lower court. This finding cannot be accepted as it is obligatory on the part of the prosecution to prove that the contraband articles and the samples were produced before the court in time as per the provisions of the Abkari Act and the Kerala Excise Manual. If the contraband articles and the samples were not produced before the court in time, it was duty of the prosecution to explain the delay and prove that the contraband articles and the samples were kept in safe custody so as to

rule out the chance of substitution. This principle has been laid own by this Court in the decision reported in **Narayani v. Excise Inspector, 2002 (3) K.L.T. 725**. Neither PW.2 nor PW.3 had given evidence as to where the contraband articles were kept till the same were produced before the court below. In the above circumstances, this Court is of the view that the finding of the trial court that the prosecution succeeded in proving that the appellant was found in possession of 12 litres of arrack cannot be accepted. There was also another charge that the arrack found in the possession of the appellant was for the purpose of sale. If that be so, it was the duty of the prosecution to prove that the contraband articles found in the possession of the appellant were in connection with export, import, transport or transit. In this context, the judgments of this Court reported in **Surendran v. Excise Inspector, 2004(1)K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2)K.L.D. (Cri) 631** are relevant. In the above two judgments, this Court has categorically held that to attract an offence punishable under Section 55(a) of the Abkari Act, the prosecution must prove that possession of the contraband articles was in connection with export, import, transport or transit. The prosecution has not adduced any evidence to show that the contraband articles found in the possession of the appellant were for sale. Hence, even if, for argument's sake, the case of the prosecution is accepted, the appellant can be found guilty only

under Section 8(1) read with Section 8(2) of the Abkari Act. This Court has already found that the trial court went wrong in accepting the evidence of PWs.2 and 3 to find the appellant guilty of the charges levelled against him. Hence, the appellant cannot be found guilty under Section 8(1) read with Section 8(2) of the Abkari Act either. The impugned judgment is, therefore, liable to be set aside.

10. Accordingly, the impugned judgment is set aside and the appellant is acquitted of all the charges levelled against him. The bail bonds executed by the appellant shall stand cancelled. If the appellant has remitted any amount towards fine, that shall be refunded to him as per law.

The Crl. Appeal is allowed as above.

(K.THANKAPPAN, JUDGE)

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